IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 888 of 1986
ALONGWITH CROSS OBJECTIONS OF THE CLAIMANTS.

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ORIENTAL INSURANCE CO.LTD.

Versus

JAGDISHCHANDRA KANCHANLAL PARIKH

Appearance:
MR RAJNI H MEHTA for Petitioner
MR SD PATEL for Respondent No. 1
NOTICE SERVED for Respondent No. 2
MR PV NANAVATI for Respondent No. 4
MR MC SHAH for Respondent No. 5, 6, 7

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision: 22/02/2000

ORAL JUDGEMENT

[Per D.C.Srivastava,J.]

This appeal and the cross objections of the claimants involve common question of law and facts hence both are proposed to be disposed of by a common judgment.

2. The appeal has been filed by the Oriental Insurance Company who had insured the vehicle bearing truck No. GTE 8109. It was a goods vehicle insured with the appellant. The respondent No.1 is the claimant. The vehicle bearing truck No. GTK 3727 is another vehicle which was involved in the incident. It was owned by the respondent No.3 and was driven by the respondent No.2. The respondent No.4 is the insurer of the said vehicle. Respondent No. 5 is the driver of the vehicle GTE 8109 whereas respondent NO. 6 was its cleaner and respondent No.7 was its owner.

3. It is not necessary for us to deal in detail the factual aspect of the case because the appeal of the appellant is based on limited point namely that the appellant is not liable under the terms of the insurance policy, under the terms of the Motor Permit issued by the Transport Authority and also in view of the apex Court's verdict in Smt. Malava etc. v/s. Oriental Ins. CO. Ltd. & Ors. reported in JT 1998 (8) SC 217.

4. We have heard Shri S.D. Patel, learned counsel for respondent No. 1, Shri P.V.Nanavaty, learned counsel for respondent NO. 4, Shri K.C.Shah, learned counsel representing Shri M.C. Shah, learned counsel for respondents nos. 5 to 7 and Shri R.H.Mehta, learned counsel for the appellant.

5. Shri Mehta has drawn our attention to the findings of the tribunal on page 26, paragraph 28 and has assailed these findings on the ground that the vehicle insured with the appellant was goods vehicle, hence, within the ambit of the insurance policy as well as the motor permit, no liability can be fastened upon the appellant for payment of compensation. He also urged that in any case, the verdict of the apex court in the case of Smt. Malava (supra) would be enough to exonerate the appellant Co. from any liability to pay compensation.

6. The finding of the tribunal has been that the driver of truck No. GTK 3727 is responsible to the

extent of 75 per cent and the driver of the truck No. GTE 8109 is responsible to the extent of 25 per cent. So far as the apportionment of the liability for the negligence is concerned, it has not been challenged by the learned counsel for the appellant. His only contention has been that inspite of this assessment, there is no liability of the appellant to pay any compensation and the compensation so assessed can be recovered from the other opposite parties who have been held responsible to this extent.

7. We have gone through paragraph 28 of the award of the Tribunal. The tribunal was of the view that the contention of opponent NO. 7 was not acceptable. The said contention was that since the applicant was passenger for hire or reward and the truck in question was a goods vehicle, in view of the policy and permit brought on record, there can be no liability of the Oriental Insurance Co. to pay any compensation. Further contention was that there was breach of the terms and conditions of insurance policy and permit. The insurance policy was filed as Exh. 127 and the permit was filed as Exh. 98. This contention was negatived by the tribunal on the ground that there is overwhelming evidence on record that the applicant has hired the truck for carriage of one bag of tuver pulse and he was travelling with it as owner of the said goods. The tribunal admitted that this fact was not alleged in the claim petition but from the evidence of the driver of the truck GTE 8109 and its cleaner, the tribunal clearly came to the conclusion that the applicant was travelling in the truck with goods and the truck was hired for carriage of the goods. Needless to say that the said fact was not pleaded in the claim petition. The tribunal, therefore, could not have permitted any evidence on the point in evidence at belated stage on a fact which is not pleaded in the claim petition and such evidence could not have been accepted by the tribunal. The tribunal has given emphasis upon this evidence and has observed that the opponent no. 7 cannot get out of this evidence. The tribunal has also referred to the judgment of this court reported in 23 GLR page 411 and has observed that it does not come to the aid of the Insurance Co. With these observations, the liability of the Insurance Company was upheld by the Tribunal.

The liability of the appellant has to be examined from three angles. The first is whether, under the terms of the insurance policy, the appellant is liable to pay any compensation. There is vague reference of the

insurance policy in the judgment of the tribunal. The Tribunal has not carefully examined the terms of the insurance policy. We have gone through the insurance policy Exh. 127. Initially, clause (iii) about limitation as to use of the goods vehicle was that the policy does not cover the use for conveyance of passenger for hire or reward. This seems to have been substituted by rubber stamp clause (iii) which provides as under:

"item-3 of limitation as to use deleted and replaced by following words:
use for carrying passengers in the vehicle except the employees and other than driver not exceeding six in number coming under the purview of the Workmens' Compensation Act, 1923."

The first two conditions for limitation as to use remained in tact as originally inserted in the insurance policy. It is further clear from the policy that the vehicle was to be used only under the Public Carriers Permit within the meaning of the Motor Vehicles Act. Consequently in the insurance policy, there was specific prohibition for use of the goods vehicle for carriage or for conveyance of passengers for hire or reward. Only driver and excepting employees not exceeding six were permitted to be carried in such goods vehicle. The evidence is that the applicant was carrying bag of tuver pulse on the truck and it was held by the tribunal that the truck was hired by the applicant for carrying his goods. It cannot be said that the applicant was not a passenger in the vehicle for hire or reward. The only vague statement of the driver and cleaner was relied upon by the Tribunal and there was no specific evidence that the applicant was permitted to travel in the truck as owner of the goods. Thus, there was obvious breach of the terms and conditions of the insurance policy on account of which there can be no liability of the insurance company.

The matter has to be examined from another angle namely with reference to permit Exh. 98 This permit is issued by the transport authorities and there is a mention in the insurance policy also that the limit of the amount of compensation and the liability is only for use under public carriers permit within the meaning of the Motor Vehicles Act, 1939. Exh. 98 is a permit issued under the Motor Vehicles Act, 1939 There is no mention in this permit that the passengers were also permitted to be carried in the goods vehicle. Consequently, on the basis of this permit also, it cannot be said that any passenger could be carried and if any

injury was caused to the passenger in the accident or death was caused, the insurance company can be held liable.

The third angle for examination is the applicability of Smt. Malava's case. Learned counsel Mr. K.C.Shah representing Mr. M.C.Shah has drawn our attention to the tests suggested and laid down by the apex court in this case and argued that the verdict of this case does not at all apply to the facts of the case before us and that the insurance company is liable to pay the compensation.

We have given our consideration to the arguments advanced by Mr. K.C.Shah and we are unable to accept his contention. In this case, the apex court has considered the conflicting views taken by various high courts as to when the goods vehicle is to be considered as vehicle for transport of goods only or vehicle for carriage of passenger for hire or reward. The apex court has approved the view taken by the Full Bench of the High Court of Orissa in the case of New India Assurance Co. Ltd. v. Kanchan Bawa & ors., 1994 ACJ 138. The apex court has laid down that the correct test to determine whether a passenger was carried for hire or reward would be whether there has been systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be vehicle in which passengers are carried for hire or reward. It would not be proper to consider a goods vehicle as a passenger vehicle on the basis of single use or use on some stray occasions at that vehicle for carrying passengers for hire or reward. What has been observed by the apex court in this case is that if the goods vehicle is systematically used for carrying passengers regularly or on frequent occasions, then, such vehicle can be said to have been used for carrying passengers. However, if on goods vehicle, passengers are carried for hire or reward, once, twice or on stray occasions, it cannot be said that the goods vehicle was carrying the passengers for hire or reward. Thus, systematic carrying of passengers in goods vehicle will render such a vehicle as passenger vehicle and not otherwise. Shri Shah has drawn our attention to paragraph 10 of this judgment but we are unable to accept his contention that this verdict is distinguishable on facts of the case before us. Thus, we are of the opinion that the verdict of the apex court in Smt. Malava's case (supra) is applicable on all force to the facts of the case before us in as much as there is nothing on record to show that except on this occasion, other passengers were carried on the truck in question for hire or reward.

Thus, from all the above three angles, the liability of the appellant to pay compensation cannot be upheld. The tribunal was, therefore, in error in holding that the appellant is liable to the extent of 25%. The award has, therefore, to be modified against the appellant and the liability of the appellant has to be set aside. However, the liability of the other respondents who have been assessed with the liability of 75% and 25% shall remain in tact and the claimant respondent NO. 1 will be at liberty to recover the entire amount of award from the other respondents.

Shri S.D.Patel has suggested that since the tribunal has assessed the liability jointly as well as severally against the respondents, it is for the appellant to realize the amount from the owner of the truck G.T.E. 8109 and pay the same to the respondent NO. 1. We are unable to agree with this suggestion. It is the option of the respondent No. 1 to proceed against the owner of this vehicle, in as much as under the law the appellant cannot be held liable to pay any compensation. The finding of the tribunal holding liability as against the appellant is erroneous and, as such, the suggestion of Sri Patel cannot be accepted. The appeal, theefore, succeeds in part only and the liability of the appellant as held by the Tribunal has to be set aside.

Coming to the cross objections filed by respondent NO. 1, the contention of Shri Patel has been that the award is bad in law and the tribunal has erred in not passing the award for full amount claimed in the claim petition. After examining the award, we do not find any error in the award in assessing the the compensation under various heads. Consequently, we are unable to enhance the amount of compensation. We do not find any merit in the cross objections which are liable to be dismissed.

The appeal is, therefore, allowed. The award passed against the appellant is quashed to the extent of 25%. The award shall remain in tact against the remaining respondents. Cross objections are dismissed. No order as to costs. Sri Mehta has submitted that the appellant has deposited the amount awarded against the appellant in the tribunal. Whatever amount is lying in deposit in the control of the tribunal shall be refunded to the appellant in view of the success of the appellant in this appeal.

22.02.2000. (D.C.Srivastava,J.)

(H.K.Rathod,J.(

Vyas